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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

In re: LITHIUM ION BATTERIES ANTITRUST LITIGATION

This Document Relates to:

ALL INDIRECT PURCHASER ACTIONS

Case No. 13-MD-02420 YGR

MDL No. 2420

REPLY BRIEF IN SUPPORT OF DEFENDANTS' JOINT SUPPLEMENTAL MOTION TO DISMISS THE INDIRECT PURCHASER PLAINTIFFS' CONSOLIDATED AMENDED COMPLAINT (PHASE II)

Date: May 9, 2014
Time: 9:30 a.m.
Judge: Hon. Yvonne Gonzalez Rogers
Location: Courtroom 5

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I. ARGUMENT

A. PLAINTIFFS LACK ANTITRUST STANDING IN *AGC* STATES BECAUSE THEY DID NOT PURCHASE PRODUCTS IN THE LITHIUM ION BATTERY CELLS COMPONENT MARKET.

1. Applying *AGC* Does Not Contravene *Illinois Brick* Repealer Laws Where State Courts Have Adopted *AGC* or Similar Antitrust Standing Principles.

Unequivocal case law establishes that state courts, interpreting their own laws, have applied *AGC* or analogous antitrust injury doctrines to sixteen of the antitrust laws and three of the consumer protection laws invoked by the IPPs here. Mot. at 4-5 & nn.4, 6. Plaintiffs attempt to evade this state-law precedent by contending—with no citation to authority—that applying their principles would contradict the "legislative intent behind *Illinois Brick* repealer statutes." Opp'n at 3-4. There simply is no basis to ask this Court to disregard controlling state law.

State courts are fully capable of determining the scope and requirements of their own antitrust laws, and those courts have found that *AGC* or analogous principles apply to the nineteen laws at issue. Moreover, those courts have already found there is no inconsistency in applying *AGC*'s antitrust standing requirements to injuries claimed by indirect purchasers. *See, e.g.*, *Wrobel v. Avery Dennison Corp.*, No. 05-cv-1296, 2006 WL 7130617, at *2-4 (Kan. Dist. Ct. Feb. 1, 2006) (rejecting the argument that that "applying *AGC* in a jurisdiction that recognizes indirect purchaser suits could effectively negate the legislative or judicial rejection of *Illinois Brick*") (citing *McCarthy v. Recordex Serv.*, 80 F.3d 842, 851 (3d Cir. 1996));[1] *see also In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig.*, 691 F.2d 1335, 1340 n.6 (9th Cir. 1982) (*Illinois Brick* is "analytically distinct" from antitrust injury analysis). These rulings are dispositive and not subject to challenge by Plaintiffs in a federal court, which is required to defer

[1] *Knowles v. Visa U.S.A.,Inc.*, No. Civ.A. CV-03-707, 2004 WL 2475284, at *3-4 (Me. Super. Ct. Oct. 20, 2004) (same); *Stark v. Visa U.S.A., Inc.*, No. 03-055030-CZ, 2004 WL 1879003, at *4 (Mich. Cir. Ct. July 23, 2004) (same); *Beckler v. Visa U.S.A., Inc.*, No. 09-04-C-00030, 2004 WL 2475100, at *4 (N.D. Dist. Ct. Sept. 21, 2004) (same); *Kanne v. Visa U.S.A., Inc.*, 723 N.W.2d 293, 298-301 (Neb. 2006) (same); *Nass-Romero v. Visa U.S.A., Inc.*, 279 P.3d 772, 781 (N.M. Ct. App. 2012) (same); *Fucile v. Visa U.S.A. Inc.*, No. S1560-03, 2004 WL 3030037, at *2 (Vt. Super. Ct. Dec. 27, 2004) (same). Plaintiffs' argument that "the Minnesota and Missouri Supreme Courts have held that *AGC* does *not* apply to claims brought under those states laws" is of no relevance, because Defendants do not contend that *AGC* applies to those laws. Opp'n at 4-5; *see* Mot. at 4 n.4.

to state court rulings in this circumstance.[2]

Plaintiffs suggest that these state law precedents are not sufficiently "a clear directive" to apply *AGC*, Opp'n at 2-3, but do not cite any contrary state authority considering whether to apply *AGC* and holding it inapplicable. *Id*. at 4 & n.4. Defendants have cited decisions from the highest courts of five states that establish the applicability of *AGC* or analogous federal antitrust standing doctrine to those states' laws.[3] Further, where state legislatures or the states' highest courts have not yet spoken on a state law issue, the Ninth Circuit has held that, in determining the substance of state law, district courts "must follow the state intermediate appellate court decision unless the federal court finds convincing evidence that the state's supreme court likely would not follow it." *Ryman v. Sears, Roebuck & Co.*, 505 F.3d 993, 994 (9th Cir. 2007). This principle covers another three *AGC* states. *See* Mot. at 4 n.4 (citing decisions from Illinois, New York, and Tennessee).

For the other state laws at issue on this motion, this Court must consider how state trial courts have decided the issue. *See, e.g.*, *Fieger v. Pitney Bowes Credit Corp.*, 251 F.3d 386, 399 (2d Cir. 2001) ("In predicting how a state's highest court would rule on an issue, it is helpful to consider the decisions of the state's trial and appellate courts."); *Bradley v. Gen. Motors Corp.*, 512 F.2d 602, 605 (6th Cir. 1975) ("[T]his court may give weight to the decision of a trial court in

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[2] Plaintiffs try to latch on to a recent Supreme Court opinion that characterized the *AGC* standing analysis under the Lanham Act as "statutory" and not "prudential." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1387 (2014). Defendants' motion, however, is not based on "prudential" arguments, but on settled state court authority applying antitrust standing analysis to indirect purchaser claims under their own state laws. Plaintiffs' argument that *AGC* should not apply to indirect purchaser claims because "*AGC* came down after *Illinois Brick*" makes no sense, as many states that allow indirect purchaser actions have also held that *AGC* applies. *See* Opp'n at 2 (underline added).

[3] *See Clayworth v. Pfizer, Inc.*, 49 Cal. 4th 758, 774 (2010) (citing *AGC* and observing that "to have an antitrust claim one must establish a causal nexus between one's injury and the alleged unlawful restraint of trade"); *Owens Corning v. R.J. Reynolds Tobacco Co.*, 868 So.2d 331, 343-44 (Miss. 2004) (applying federal antitrust injury principles to Mississippi antitrust claim); *Kanne*, 723 N.W.2d at 298-301; *Romero v. Philip Morris, Inc.*, 148 N.M. 713, 724 (2010) ("It is . . . the duty of the courts to ensure that New Mexico antitrust law does not deviate substantially from federal interpretations of antitrust law"); *Nass-Romero*, 279 P.3d at 778-81 (applying *AGC* following instruction of N.M. Supreme Court in *Romero*, 148 N.M. at 724); *Princeton Ins. Agency, Inc. v. Erie Ins. Co.*, 225 W.Va. 178, 184-85, 189-90 (2009) (applying federal antitrust injury principles and observing that a plaintiff must allege "that it was injured as a proximate result" of "anticompetitive effects within the relevant … markets").

determining what is the controlling law of Tennessee").[4] Thus, all nineteen state laws at issue are governed by *AGC* or analogous principles. *See* Mot. at 4-5 & nn. 4, 6.

Plaintiffs only offer citations to: (i) inapposite state statutes that generally allow suits by indirect purchasers, but which (as discussed above) are not inconsistent with also applying *AGC* principles; and (ii) individual cases that do not apply *AGC* under the specific facts of those cases (but which do not hold the doctrine to be generally inapplicable).[5]

Nor is it correct, as Plaintiffs contend, that "Judges Illston, Alsup, and Seeborg, have considered and rejected the applicability of *AGC*" under "[a]ll of the state laws under which Plaintiffs bring their claims . . . ." Opp'n at 3. None of the cited decisions found that *AGC* did not apply to any of the state laws before them. They instead reviewed the particular complaints at issue and found that, based on the specific facts pleaded, *AGC* would be satisfied at the pleading stage.[6] Such fact-specific rulings provide no guidance on the issue of whether *AGC* applies to the laws of a particular state.

For example, *GPU*, cited by Plaintiffs, is inapposite because Defendants are not asking the

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[4] *See also In re Dynamic Random Access Memory (DRAM) Antitrust Litig.*, 516 F. Supp. 2d 1072, 1094 (N.D. Cal. 2007) ("*DRAM I*"); *In re Aftermarket Auto. Lighting Prods. Antitrust Litig.*, 2009 WL 9502003, at *4 (C.D. Cal. July 6, 2009) (tentative ruling *adopted sub nom Sahagian v. Genera Corp.*, 2009 WL 7185616, at *1 (C.D. Cal. July 7, 2009)).

[5] In fact, Plaintiffs cite at least five cases that actually *support* applying *AGC* in the states at issue: *Orr v. Beamon*, 77 F. Supp. 2d 1208, 1211-12 (D. Kan. 1999) (analyzing standing under federal and Kansas state antitrust statutes together because federal case law is "sufficiently persuasive to guide its decision with regard to standing under Kansas law."); *Peterson v. Visa U.S.A. Inc.*, No. 03-8080, 2005 WL 1403761, at *4-9 (D.C. Super. Apr. 22, 2005) ("[Plaintiff] lacks standing … because of the following *Associated General Contractors* factors: (1) his claims are remote and speculative; (2) more direct victims exist to enforce the antitrust laws; and (3) he has not shown that his harm is the type for which the antitrust laws provide redress"); *Cnty. of Cook v. Philip Morris, Inc.*, 817 N.E.2d 1039, 1045-48 (Ill. Ct. App. 2004) (quoting and citing *AGC* favorably and dismissing state claims under "remoteness doctrine"); *Romero*, 148 N.M. at 724 (discussed *supra*, n.3); *Owens Corning*, 868 So. 2d at 343-44 (discussed *supra*, n.3). Plaintiffs also cite to a few federal decisions that declined to decide whether *AGC* applied to the states at issue. *See* Opp'n at 4 n.4. These cases provide no guidance for the Court here on the *AGC* issue, which is a matter of individual state law.

[6] *See In re TFT-LCD (Flat Panel) Antitrust Litig.* ("*LCD*"), 586 F. Supp. 2d 1109, 1122 (N. D. Cal. 2008); *In re Graphics Processing Units Antitrust Litig.* ("*GPU II*"), 540 F. Supp. 2d 1085, 1097-98 (N. D. Cal. 2007); *In re Optical Disk Drive Antitrust Litig.*, No. 3:10-cv-2143 RS, 2011 U.S. Dist. LEXIS 101763, at *46 (N. D. Cal. Aug. 3, 2011).

Court here to "pronounce a blanket and nationwide revision of all state antitrust laws." Opp'n at 3 (quoting *In re Graphic Processing Units Antitrust Litig.* ("*GPU I*"), 527 F. Supp. 2d 1011, 1026 (N.D. Cal. 2007)). Rather, as *GPU* recognized, "[s]tanding under each state's antitrust statute is a matter of that state's law"—which is exactly Defendants' position here. *Id.* Indeed, in a later *GPU* order, Judge Alsup found that *AGC* was applicable to a number of state laws, but declined to consider which specific states would be governed by *AGC* principles because he also found, based on the specific facts alleged in that case (and unlike here), that *AGC* standing would be satisfied by the facts that were pleaded. *GPU II*, 540 F. Supp. 2d at 1097-98. A fact-specific ruling like this has no bearing on the pure legal issue of whether the *AGC* doctrine applies under the laws of a particular state.

Finally, while Plaintiffs assert that *AGC* should not be applied to the laws of three states that have federal antitrust law harmonization provisions (Opp'n at 5), Defendants have cited to federal court decisions—including a controlling Ninth Circuit opinion (addressing Oregon antitrust law)—that have already held that federal antitrust standing requirements apply to these three states. *See* Mot. at 4-5 & n.5.[7] Plaintiffs cite no contrary authority or offer any persuasive rationale why these precedents should not be followed.

2. Once This Court Determines that *AGC* Principles Apply, It Must Rule That Plaintiffs Lack Antitrust Injury Because They Were Not Participants in the Allegedly Restrained Component Market For Lithium Ion Battery Cells.

In states where *AGC* principles apply, it cannot be seriously contested that Plaintiffs must

[7] The case Plaintiffs cite to argue that "harmonization clauses do not require consistency" between state and federal law was not addressing the Nevada, New Hampshire, or Oregon statutes—two of which *do* require consistency with federal law. *See* Nev. Rev. Stat. 598A.050 ("[T]his chapter *shall be construed in harmony* with prevailing judicial interpretations of the federal antitrust statutes") (emphasis added); Or. Rev. Stat. § 646.715 ("The decisions of federal courts in construction of federal law relating to the same subject *shall be persuasive authority*") (emphasis added); *see also* Opp'n at 5 (citing *D.R. Ward Constr. Co. v. Rohm and Haas Co.*, 470 F. Supp. 2d 485, 498-501 (E.D. Pa. 2006)). As for New Hampshire, the federal district court in that state has held that federal antitrust standing requirements do apply based on New Hampshire state court authority. *See Donovan v. Digital Equip. Corp.*, 883 F. Supp. 775, 785-87 (D.N.H. 1994). Similarly, a Florida federal court has held that federal antitrust standing principles apply to claims under the Florida consumer protection statute. *JES Props., Inc. v. USA Equestrian, Inc.*, No. 802CV1585T24MAP, 2005 WL 1126665, at *19 (M.D. Fla. May 9, 2005).

allege that that they "were 'participants' in the relevant market" to demonstrate that they have suffered antitrust injury. *See* Mot. at 6-8; Opp'n at 6-7. Indeed, failure to allege antitrust injury is, by itself, an "independent ground" for dismissal. Mot. at 3 (quoting *Ass'n of Wash. Pub. Hosp. Dists. v. Philip Morris Inc.*, 241 F.3d 696, 704 (9th Cir. 2001)). Plaintiffs contend that the *AGC* market participation requirement "must be balanced along with the other factors," Opp'n at 6 & n.6, but the Ninth Circuit actually held in *American Ad Management* that "[a] showing of antitrust injury *is necessary, but not always sufficient*, to establish standing . . . ." *Am. Ad Mgmt. v. Gen. Tel. Co.*, 190 F.3d 1051, 1055 (9th Cir. 1999) (quoting *Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 110 n.5 (1986)) (emphasis added). Thus, failure to allege participation in the relevant market is failure to allege a "necessary" requirement of antitrust standing, regardless of the other *AGC* factors. *Id.*; *In re Dynamic Random Access Memory (DRAM) Antitrust Litig.*, 536 F. Supp. 2d 1129, 1136, 1141 (N.D. Cal. 2008) ("*DRAM II*").

As the Court knows, some cases in this district have found *AGC* satisfied by specific facts alleged at the pleading stage, while other cases have reached the opposite conclusion. Defendants reviewed these cases in their moving brief and demonstrated why, based on the facts alleged by Plaintiffs here, the pleadings are insufficient under the *AGC* test. *See* Mot. at 6-8, 11-13. In particular, Plaintiffs' allegations are very similar to the facts alleged in *DRAM*, which resulted in two thoroughly reasoned decisions by Judge Hamilton finding that *AGC* was not satisfied. *Id.* at 6-8.

Indeed, Plaintiffs do not even attempt to distinguish this case from *DRAM*. *See* Opp'n at 9-10. Instead, Plaintiffs try to discredit Judge Hamilton's decisions, arguing that "*DRAM II* is not the majority rule," that "*DRAM II* was never fully resolved" because the case settled while on appeal, and that the decision improperly "gave substantial weight to the market participation factor under *AGC* . . . ." *Id.* None of these arguments has any merit. First, there can be no "majority rule" for whether *AGC* has been satisfied by a particular complaint, because, as the Supreme Court has held, each case must be evaluated under its "specific circumstances." *AGC*, 459 U.S. at 537. That is precisely what the judges in this district, including Judge Hamilton in *DRAM*, have done. Mot. at 6-8, 11-13. Second, there is no basis to disregard Judge Hamilton's well-reasoned

decision, applying *AGC* to very similar factual allegations to those presented here, merely because it was never reviewed by the Court of Appeals. If this were the case, all of the decisions that Plaintiffs cite would also need to be disregarded because they too were never reviewed on appeal. Third, a dismissal solely for failure to allege market participation facts establishing antitrust injury is entirely proper—and, indeed, required—because the Ninth Circuit has held, as noted above, that "antitrust injury is necessary … to establish standing" and thus is an "independent ground" for dismissal. *Am. Ad. Mgmt.*, 190 F.3d at 1055; *Ass'n of Wash. Pub. Hosp. Dists.*, 241 F.3d at 704.

The alleged conspiracy here was in the component market for "raw cells," which Plaintiffs allege that they did not and cannot purchase, because "manufacturers . . . do not sell individual cells" to consumers such as Plaintiffs. Mot. at 7-8; IPP-CAC ¶¶ 29-30, 187; *see also* IPP-CSAC ¶¶ 30-31, 261.[8] Instead, Plaintiffs allege participation in the "consumer market" for "consumer products or standalone products, for example, replacement batteries."[9] Order re: Motions to Dismiss, ECF No. 361, at 4; Mot. at 7-8; IPP-CAC ¶¶ 29-30, 242; *see also* IPP-CSAC ¶¶ 30-31, 322. These allegations mirror the allegations in *DRAM*, where Judge Hamilton twice determined that antitrust injury and standing were lacking because "plaintiffs who are purchasing products in which DRAM is a component, rather than DRAM itself, are participating in a secondary market that is incidental to the primary price-fixed market (i.e., the market for DRAM modules themselves)." *DRAM I*, 516 F. Supp. 2d at 1089-91; *see also DRAM II*, 536 F. Supp. 2d at 1135-42; Mot. at 7-8. Given the substantively identical operative market participation facts, Plaintiffs similarly lack antitrust standing in all applicable *AGC* states.

In response, Plaintiffs advance a few erroneous legal propositions, none of which save

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[8] Defendants were instructed by the Court to file their Phase II motion to dismiss before Plaintiffs filed the IPPs' Consolidated Second Amended Complaint, ECF No. 408 ("IPP-CSAC"). For consistency with their opening brief, Defendants cite the IPP-CAC, which Plaintiffs represented at the February 7, 2014 hearing would be substantively identical in the Consolidated Second Amended Complaint, along with parallel citations to the IPP-CSAC, where applicable.

[9] Plaintiffs' reliance on the facts alleged in *Knevelbaard Dairies* is misplaced, because there the plaintiffs alleged that they "sold milk directly or indirectly to one or more of the defendants"—*i.e.*, both the plaintiffs and defendants participated in the market for milk. Opp'n at 7; *Knevelbaard Dairies v. Kraft Foods, Inc.*, 232 F.3d 979, 984 (9th Cir. 2000).

their claims from dismissal under the state laws where *AGC* governs:

- *"[H]arm to consumers in the form of supra-competitive prices flowing from Defendants' collusion" gives rise to antitrust injury. Opp'n at 7.* This argument lacks merit because "[p]arties whose injuries, though flowing from that which makes the defendant's conduct unlawful, are experienced in another market do not suffer antitrust injury." *Ass'n of Wash. Pub. Hosp. Dists.*, 241 F.3d at 705 (quoting *Am. Ad. Mgmt.*, 190 F.3d at 1057).

- *"No case has held that a consumer who has paid an overcharge has not suffered antitrust injury." Opp'n at 8.* This is demonstrably false as numerous cases have done so where the plaintiffs suffered their alleged overcharge in a secondary market. *See, e.g.*, *DRAM II*, 536 F. Supp. 2d at 1137-41; *In re Refrigerant Compressors Antitrust Litig.*, No. 2:09-md-02042, 2013 WL 1431756, at *11-13 (E.D. Mich. Apr. 9, 2013); *In re Aftermarket Auto. Lighting Prods. Antitrust Litig.*, 2009 WL 9502003, at *1, 5; *Lorenzo v. Qualcomm, Inc.*, 603 F. Supp. 2d 1291, 1296, 1302-03 (S.D. Cal. 2009) (dismissing class action claims brought by an "end-user, who purchased indirectly" for failure to allege antitrust injury even where the allegedly supracompetitive prices were "ultimately pass[ed] . . . on to end consumers").

- *Dismissal here would mean that "every single indirect purchaser price-fixing case in this District – and in the United States – involving claims for products containing price-fixed components would have been dismissed." Opp'n at 7.* This is not true because the application of *AGC* is a fact-specific determination based on the specific allegations of each complaint. This is why courts, when presented with different factual allegations, have concluded that *AGC* standards were satisfied. *See* Mot. at 11-13.

- *"[I]nterchangeability and cross-elasticity between a product and its price-fixed component has not been accepted as a requirement for showing market participation . . . ." Opp'n at 11.* It is surprising that Plaintiffs make this argument because *Flash Memory*—a case that Plaintiffs rely on throughout their opposition—applied this exact test to determine antitrust standing. *In re Flash Memory Antitrust Litig.*, 643 F. Supp. 2d 1133, 1153-54 (N.D. Cal. 2009); *see* Mot. at 12 (discussing the factual differences between *Flash Memory* and Plaintiffs' fact allegations here). Indeed, this is the test for market participation set forth by the Ninth Circuit,

and that has been applied in this District. *See Bhan v. NME Hosps., Inc.*, 772 F.2d 1467, 1470-71 (9th Cir. 1985); *DRAM II*, 536 F. Supp. 2d at 1137-41. As Plaintiffs admit that they "do not contend that batteries and laptops are substitutes or 'reasonably interchangeable,'" Opp'n at 10, they cannot meet the controlling *Bhan* test.

- *"[A]llegations that price-fixed components are physically traceable to end purchasers are an independent basis for finding antitrust standing . . . ." Opp'n at 11*. In *GPU*, the *combination* of allegations of traceability and performance characteristics that were selling points to consumers was found to "slightly favor[] standing." *GPU II*, 540 F. Supp. 2d at 1098. Plaintiffs, however, have alleged the opposite—that batteries "are commodity-like products" manufactured "pursuant to standard specifications." Mot. at 12; IPP-CAC ¶ 254; *see also* IPP-CSAC ¶ 334. As Judge Hamilton explained, allowing traceability alone to substitute for market participation undermines the foundations of antitrust standing because "nearly all markets that service one another can be said to be 'related' to such a degree that the impact of one upon another could allegedly be 'proven' with the use of econometrics." *DRAM II*, 536 F. Supp. 2d at 1141. This conclusion is particularly apt here, where Plaintiffs concede that battery cells are packed by independent companies, which in turn sell them to finished product manufacturers, which in turn sell to retailers, which in turn sell to consumers without any particular, traceable emphasis on the specific battery cells utilized.[10]

- *"Defendants . . . draw from [the other cases from this District] a pleading standard that does not exist." Opp'n at 12-14.* This is incorrect. The other decisions from this District upon which Plaintiffs rely—*CRT*, *LCD*, and *GPU*—found *AGC* to be satisfied at the pleading stage based on the specific characteristics of the products and markets that were alleged in those cases, which have not been alleged here. *See* Mot. at 11-13. In *CRT*, for example, plaintiffs were found to have standing because it was alleged that the "market for CRTs and the market for CRT Products are . . . inextricably linked and cannot be considered separately," because the allegedly price-fixed component—the cathode ray tube—"account[ed] for approximately sixty per cent of

[10] *See* IPP-CAC ¶¶ 29-30, 296-298; *see also* IPP-CSAC ¶¶ 30-31, 376-378.

the cost of manufacturing" the finished product. *In re Cathode Ray Tube (CRT) Antitrust Litig.* ("*CRT*"), 738 F. Supp. 2d 1011, 1023-24 (N.D. Cal. 2010); *see also LCD*, 586 F. Supp. 2d at 1124 ("LCD panels make up 60-70% of the cost of an LCD television or computer monitor").[11] Here, by contrast, there are no similar allegations that the cost of a raw cell accounts for a majority of the cost of the finished consumer products purchased by the Plaintiffs. Indeed, it is implausible that such allegations could be made about a battery cell, incorporated into a battery pack, that, in turn, is only one of a large number of other more expensive components contained in a finished product like a laptop computer. Plaintiffs' vague and conclusory allegation that "Lithium Ion Batteries make up a substantial component cost of Lithium Ion Battery products," *see* Opp'n at 13, does not make it plausible that such an undefined component cost is large enough that the markets are "inextricably linked and cannot be considered separately." *CRT*, 738 F. Supp. 2d at 1023-24. For example, Plaintiffs do not dispute that the cost of an individual raw lithium ion battery cell would be no more than a few dollars, while a laptop computer purchased by a consumer would cost hundreds, if not thousands of dollars, and be purchased in a market with entirely different relevant factors than that for lithium ion battery cells.

3. Plaintiffs Have Also Failed to Satisfy the Other *AGC* Factors

Defendants have shown that Plaintiffs failed to satisfy the *AGC* directness factor because they failed to allege facts that "as indirect purchasers, there is a direct link in the causation chain between defendants' alleged conspiracy to restrain prices, and the artificially high prices paid by plaintiffs." *DRAM I*, 516 F. Supp. 2d at 1091; Mot. at 9-10. Unlike in the cases relied on by Plaintiffs (again *CRT*, *LCD*, and *GPU* (*see* Opp'n at 11-14)),[12] it is the cells' "nature as a ubiquitous component in all manner of personal electronic devices that are purchased for end use [that] lessens the directness of its impact on price." *DRAM I*, 516 F. Supp. 2d at 1091.

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[11] Although Plaintiffs argue that the plaintiffs in *LCD* "*never* alleged that the cost of the LCD panels comprised a large percentage of the cost of all LCD products at issue," the *LCD* court indicated that it was in fact relying on such allegations. *See* Opp'n at 13.

[12] Plaintiffs also cite to the complaint in the *SRAM* case, but they cite to no decision from the *SRAM* court discussing how the complaint's allegations were sufficient to confer *AGC* antitrust standing in the context of that case. *See* Opp'n at 12-13.

As noted above, the components at issue in *CRT* and *LCD* were alleged to be integrated only into a very limited set of finished products, and they were further alleged to be the predominant factor that determined the price of those finished products. *See CRT*, 738 F. Supp. 2d at 1016, 1023-24 (televisions and computer monitors); *LCD*, 586 F. Supp. 2d at 1113, 1124 (televisions, computer monitors/laptop computers, cellular phones); Mot. at 11-13. In *GPU*, the component was alleged to be a "separately-invoiced component" incorporated into limited types of finished products and was "severable from the computer itself." *GPU II*, 540 F. Supp. 2d at 1098.

Here, by contrast, Plaintiffs allege that lithium ion battery cells are incorporated into a broad array of different types of finished products purchased by different Plaintiffs, which requires the raw cells to be transformed for specific uses with custom enclosures and circuitry. *See* IPP-CAC ¶ 3; *see also* IPP-CSAC ¶ 4. Given the breadth and variation of the finished products at issue here, from technologically simple and low-cost power tools to high-end laptop computers, with different manufacturing and distribution chains subject to different supply and demand forces, the conclusory allegation that the batteries are traceable by model number provides no indication that the "ultimate cost of the . . . component is somehow directly traceable and/or distinguishable" "within the final purchase price of a given product . . . ." *DRAM I*, 516 F. Supp. 2d at 1092; *see also Lorenzo*, 603 F. Supp. 2d at 1301 (injury too remote where it would require "trac[ing] through three levels of the supply chain" and "disaggregat[ion] from a multitude of other manufacturing and component factors."); *In re Refrigerant Compressors Antitrust Litig.*, 2013 WL 1431756, at *14; Mot. at 9-11.

For similar reasons, *AGC* standing cannot be established in cases like this, where Plaintiffs are "faced with the daunting task of proving the effect of the prohibited conduct on the price at any and all levels above them and then at their removed position in the chain of distribution, and disproving, or at least quantifying, the effects of a multitude of other pricing considerations which clearly did or could have intervened at any relevant level." *Strang v. Visa U.S.A., Inc.*, No. 03 CV 011323, 2005 WL 1403769, at *5 (Wis. Cir. Ct. Feb. 8, 2005); *see* Mot. at 10-11.[13]

[13] Plaintiffs cite to the class certification decisions in *SRAM* and *LCD* as purported support for

Plaintiffs allege purchases of a broad array of consumer products from different sellers at different levels of the distribution chain, with a multitude of factors affecting the price of the those products. Plaintiffs thus cannot meet the *AGC* test of alleging facts to show that their indirect damages are not "unduly speculative" and unduly "difficult to apportion, in view of the fact that the plaintiffs in question purchased their [battery cells] in the form of a component product." *DRAM I*, 516 F. Supp. 2d at 1092; *see also Kanne*, 723 N.W.2d at 199; *Knowles*, 2004 WL 2475284, at *6; *Fucile*, 2004 WL 3030037, at *4.

B. THE COURT SHOULD DETERMINE NOW THAT PLAINTIFFS LACK CONSTITUTIONAL STANDING TO ASSERT THEIR MONTANA AND NON-CALIFORNIA GOVERNMENTAL SUBCLASS CLAIMS.

Despite voluminous case law in the Ninth Circuit—including no less than *seven prior antitrust MDLs in this District alone*—holding that a named plaintiff lacks Article III standing to represent a separately-defined class or subclass unless he or she is a member of that class; despite the fact that similarly-situated class plaintiffs in the *LCD* and *Flash* cases simply conceded the issue; and contrary to the statements made by Plaintiffs' counsel at the February 7, 2014 status hearing in this litigation, Plaintiffs *nonetheless* maintain that they have standing to assert claims on behalf of classes of which no named plaintiff is alleged to be a member.[14] With the exception of

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their contention that their ability to prove damages is not unduly speculative. *See* Opp'n at 14-15 (citing *In re Static Random Access Memory (SRAM) Antitrust Litig.*, 264 F.R.D. 603, 612 (N.D. Cal. 2009); *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 267 F.R.D. 583, 603 (N.D. Cal. 2010)). However, to the extent that any class certification decision is relevant to an *AGC* standing determination (which it is not), *GPU* is more instructive with respect to the facts alleged in this case. *See In re Graphics Processing Units Antitrust Litig.*, 253 F.R.D. 478, 504 (N.D. Cal. 2008). *GPU* involved "the fact that the indirects purchased graphics cards and computers from potentially thousands of different retailers and manufacturers, some of whom negotiated special prices for the graphics products that they in turn purchased from defendants." *Id.* The Court denied certification of the indirect purchasers' state law subclasses because "the only way to fully assess pass-through in this action would be to conduct a wholesaler-by-wholesaler and re-seller-by-re-seller investigation, which would essentially result in thousands of mini-trials, rendering this case unmanageable and unsuitable for class action treatment." *Id.* at 505 (internal quotation marks omitted).

[14] The classes that remain at issue on this motion are: (1) Plaintiffs' alleged Montana Damages Class; and (2) twenty-nine of Plaintiffs' thirty "State Governmental Damages Classes," consisting of subclasses of governmental purchasers in states other than California. After this motion was filed, Plaintiffs filed their IPP-CSAC, which remedies the prior deficiency as to the Utah claim.

one novel (yet equally unavailing) argument discussed below, every contention Plaintiffs advance in support of their position has been squarely rejected by the courts of this Circuit.

First, Plaintiffs claim this motion conflates constitutional standing with class certification issues. Opp'n at 18. But under binding case law, Article III standing is entirely distinct from class certification issues, asking not whether alleged injuries are "sufficiently similar," but whether any named plaintiff is alleged to be a member of each class or subclass alleged. *Schlesinger v. Reservists Comm. To Stop the War*, 418 U.S. 208, 216 (1974) ("To have standing to sue as a class representative it is essential that a plaintiff must be a part of that class."). Similarly, it is not enough that each named plaintiff alleges a "personal injury" (Opp'n at 17-18); rather, for each class or subclass claim asserted there must be a named plaintiff who alleges injury *as a member of that class*. *See Meijer, Inc. v. Abbott Laboratories*, 2008 WL 4065839, at *4 (N.D. Cal. Aug. 27, 2008) ("'[I]t is well-settled that prior to the certification of a class . . . the district court must determine that at least one named class representative has Article III standing to raise each class []claim.'") (quoting *Wooden v. Bd. of Regents of Univ. Sys. of Ga.*, 247 F.3d 1262, 1287-1288 (11th Cir. 2001)). Plaintiffs do not even attempt to argue that this requirement is satisfied.

Ninth Circuit law is equally clear that constitutional standing issues are to be decided at the pleading stage. While Plaintiffs claim that *Easter* "gave district courts discretion" to delay resolution of standing issues until class certification (Opp'n at 19), the opinion says no such thing. Instead, *Easter* identified a single inapplicable situation where standing issues can be deferred—where the court is addressing a "mandatory global settlement class"—and otherwise endorsed the rule that "a court must be sure of its own jurisdiction before getting to the merits." *Easter v. Am. West Fin.*, 381 F.3d 948, 962 (9th Cir. 2004) (internal citations and quotations omitted). Other Ninth Circuit decisions also hold that "[s]tanding is a jurisdictional element that must be satisfied prior to class certification." *Lee v. State of Oregon*, 107 F.3d 1382, 1390 (9th Cir. 1997) (citation and internal quotation marks omitted); *accord Bates v. UPS, Inc.*, 511 F.3d 974, 985 (9th Cir. 2007) (en banc) ("Standing is a threshold matter central to our subject matter jurisdiction. We

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See IPP-CSAC ¶ 437.

must assure ourselves that the constitutional standing requirements are satisfied before proceeding to the merits.").

Plaintiffs make no meaningful attempt to distinguish the numerous cases following *Easter*, including the antitrust precedents from this District, that have decided standing issues at the pleading stage, asserting only that these cases "include little analysis." Opp'n at 20. But the reasons for resolving standing deficiencies immediately are well-established. "In essence, the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues," and therefore standing "is the threshold question in every federal case, determining the power of the court to entertain the suit." *Warth v. Seldin*, 422 U.S. 490, 498 (1975); *accord Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94-95 (1998).

As anticipated in Defendants' opening brief, Plaintiffs rely entirely on inapposite cases, all but one of which are from other Circuits, involving challenges to an alleged single class of *nationwide* purchasers of which the existing named plaintiffs were alleged to be members—not, as here, individually-defined state-specific classes and subclasses. *See* Opp'n at 18-19. Plaintiffs fail to explain why these cases should be followed when they contradict governing Ninth Circuit law.

Finally, in a last attempt to avoid immediate dismissal of their governmental subclass claims for lack of standing, Plaintiffs appear to argue that the Court should defer dismissal of these claims until class certification because it is possible that *the Court* might elect at that time to create informal "managerial subclasses" of governmental purchasers—which Plaintiffs suggest would somehow retroactively moot their standing deficiencies.[15]

An obvious problem with this argument is that Plaintiffs' governmental subclass claims are not "managerial subclasses" under Plaintiffs' own authorities. Where appropriate, "managerial subclasses" are *informally* created *by the court* at the class certification stage for case management purposes by "segregating" a portion of a broader class that implicates a "distinct legal issue." *See, e.g., Am. Timber & Trading Co. v. First Nat'l Bank*, 690 F.2d 781, 786-787 (9th Cir. 1982) (court

[15] By its own terms, this argument could not save the Montana claim, which Plaintiffs do not claim was asserted for purposes of demonstrating potential class certification "management tools."

created additional subclass "solely to expedite resolution of the case by segregating the compensating balance issue which was common to some members of the existing subclasses."). But here *Plaintiffs*, not the Court, decided to *formally* assert claims on behalf of governmental subclasses. While Plaintiffs say they made these claims solely to educate the Court about "managerial tools" that may be useful at class certification (Opp'n at 21), this post-hoc justification is irrelevant: *every* class and subclass claim formally asserted in Plaintiffs' complaint is subject to Article III standing requirements. *See, e.g., Prado-Steiman v. Bush*, 221 F.3d 1266, 1279 (11th Cir. 2000) ("it is well-settled that prior to the certification of a class, and technically speaking before undertaking any formal typicality or commonality review, the district court must determine that at least one named class representative has Article III standing to raise each class subclaim."); *Betts v. Reliable Collection Agency, Ltd.*, 659 F.2d 1000, 1005-06 (9th Cir. 1981) ("a fundamental requirement in the establishment of a subclass is that the representative plaintiff must be a member of the class she wishes to represent").

Plaintiffs also argue that Defendants have not demonstrated conflicts or material differences in the claims of the proposed class and subclass members (Opp'n at 22-23). But that is not Defendants' burden on this motion to dismiss. Moreover, Plaintiffs' argument ignores reality, including significant differences in how large governmental entities and individual consumers procure products, and the manner in which claims on their behalf are litigated. For example, government agencies often assert antitrust claims via assignment from their vendors. *See, e.g.*, Ballard Decl. (Dkt. No. 401-1), Ex. F at 39-41 (New York AG complaint in *LCD*) (alleging claims based on assignment); *Id.* Ex. H at 40-41 (California AG complaint in *CRT*) (same). In addition, some states do not allow some government entities—including those at issue here—to sue under the state unfair competition laws Plaintiffs invoke. *See, e.g.*, Cal. Bus. & Prof. Code § 17201 ("person" under California UCL does not include government entities); *Santa Monica Rent Control Bd. v. Bluvshtein*, 230 Cal. App. 3d 308, 318 (Cal. Ct. App. 1991) (government agency lacked standing to bring suit); *see also* Mont. Code Ann. §§ 30-14-102(1), 30-14-133(1) (providing right of action for "consumer[s]," defined as persons who purchased "primarily for personal, family, or household purposes").

Overwhelming precedent in this Circuit requires that standing deficiencies be resolved immediately. Plaintiffs identify no cases in which a court in this Circuit has indulged in speculation about a "managerial" subclass as a reason to delay resolution of standing. The only proper result is dismissal now of these claims on behalf of classes of which no Plaintiff is a member.

C. PLAINTIFFS' ARGUMENTS AGAINST APPLICATION OF *ILLINOIS BRICK* TO CERTAIN MONTANA AND MISSOURI CLAIMS ARE MERITLESS

1. Montana

Plaintiffs argue that *Illinois Brick* does not preclude them from asserting a claim under Part 1 of Montana's Unfair Trade Practices and Consumer Protection Act, Mont. Code Ann. § 30-14-103. Opp'n at 24-25. But Defendants have moved to dismiss Plaintiffs' claim under Part 2 of the statute on *Illinois Brick* grounds.[16] Mot. at 21. Controlling Montana Supreme Court authority mandates dismissal of these claims, as the *CRT*, *LCD* and *SRAM* courts each held. *Id*. at 21-22 (citing cases). Plaintiffs ignore these authorities and instead rely on a single, contrary unpublished slip opinion from a Montana trial court. Opp'n at 25 (citing *Olson v. Microsoft Corp*., No. CDV-2000-219, 2001 Mont. Dis. LEXIS 2710 (Feb. 15, 2001)). The *Olson* trial court, however, wrongly ignored the Montana Supreme Court's dictate. Moreover, *Olson* has no precedential value, because this Court is bound to follow Montana's highest court on this state law issue. *United Bhd. of Carpenters & Joiners of Am. Local 586 v. Nat'l Labor Relations Bd.*, 540 F.3d 957, 963 (9th Cir. 2008). Montana's Supreme Court has held that Montana's antitrust law must be construed in accordance with federal law. *Smith v. Video Lottery Consultants, Inc.*, 858 P.2d 11, 13 (Mont. 1993). This includes *Illinois Brick*'s ban on indirect purchaser damages actions under Part 2 of the statute.

2. Missouri

Missouri's antitrust statute expressly requires judicial interpretation consistent with federal antitrust laws, and Missouri courts have followed that mandate by dismissing indirect purchaser claims under the state's antitrust law. Plaintiffs try to dodge this limitation by rebranding their

[16] As discussed *infra*, claims under Part 1 of the statute cannot be brought as class actions.

antitrust claim as a violation of the state's Merchandising Practices Act, but cite no Missouri authority to support this. The sole Missouri authority upon which Plaintiffs rely is not an antitrust case. *See* Opp'n at 24 (citing *Gibbons v. Nuckolls, Inc*., 216 S.W.3d 667 (Mo. 2007)). *Gibbons* did not consider whether an indirect purchaser may assert an antitrust claim under the MMPA, and thus did not abrogate the holding in *Ireland v. Microsoft Corp.*, that indirect purchasers may not bring antitrust claims under the MMPA. 2001 Mo. App. LEXIS 2371 (Feb. 7, 2001).

D. MANY OF PLAINTIFFS' INDIVIDUAL STATE LAW CLAIMS HAVE ADDITIONAL LEGAL DEFICIENCIES REQUIRING DISMISSAL.

1. Supreme Court and Ninth Circuit Precedent Preclude Class-Action Claims Under Illinois, Montana and South Carolina Law.

Although the Illinois, Montana and South Carolina statutes each create a private right of action, the exact subsection (and in two cases, the same sentence) that *confers* that substantive right also *limits* it, by prohibiting plaintiffs from bringing or maintaining class actions. 740 Ill. Comp. Stat. § 10/7(2); Mont. Code Ann. § 30-14-133(1); S.C. Code Ann. § 39-5-140(a). Thus, these state legislatures have defined the right to sue by excluding representative claims. Plaintiffs urge the Court to lift these limitations, redefining the substantive rights afforded by these states. Doing so, however, would "abridge, enlarge or modify" the substantive right to sue under these statutes, violating the Rules Enabling Act, pursuant to Justice Stevens' controlling concurrence in *Shady Grove Orthopedic Assoc. v. Allstate Ins. Co*., 559 U.S. 393 (2010). Mot. at 23-26 (citing 28 U.S.C. § 2072(b)). Plaintiffs argue that neither Justice Stevens' concurrence nor the plurality opinion in *Shady Grove* control the Rules Enabling Act analysis, and urge the Court to apply Ninth Circuit precedent. Opp'n at 26-28. But whether *Shady Grove* or pre-existing Ninth Circuit law is applied, the result is the same: Plaintiffs may not pursue class claims under these statutes.

As to *Shady Grove*, Plaintiffs urge the Court to disregard the "clear majority" of courts (*see* Mot. at 24-25) that follow Justice Stevens' concurrence under the "narrowest grounds" doctrine of *Marks v. United States*, 430 U.S. 188 (1977). Opp'n at 26-29. Plaintiffs argue that, to control, a concurrence must represent not just the "narrowest grounds" supporting the judgment, but also be a "logical subset" of a broader opinion, and "represent a common denominator of the Court's reasoning." Opp'n at 28. But Justice Stevens' concurrence meets these criteria.

The concurrence shares a "common denominator" with the plurality in its "accept[ance]" of the plurality's "framework," and at least part of the plurality's analysis under the Rules Enabling Act. *Shady Grove*, 559 U.S. at 410 (plurality op.); *id.* at 426 (Stevens, J., concurring) ("the plurality appears to agree with much of my interpretation"). The concurrence is a "logical subset" of the plurality in that it applies an additional step in the Enabling Act analysis, examining the state law, thus employing a more restrictive test that could only result in fewer displacements of state law. Several courts have applied the "common denominator" or "logical subset" tests and concluded that Justice Stevens' concurrence is *Shady Grove*'s operative holding.[17]

Even if the Court were to accept Plaintiffs' argument that *Shady Grove* does not control the Rules Enabling Act analysis, Plaintiffs' class-action claims would still fail under Ninth Circuit precedent. Like Justice Stevens, Ninth Circuit authority examines the state law to determine whether it "create[s] any substantive right" or "add[s], subtract[s] or define[s]" a state law element. *Freund v. Nycomed Amersham*, 347 F.3d 752, 761-62 (9th Cir. 2003); *compare Shady Grove*, 559 U.S. at 423 (Stevens, J., concurring) (state rule may be deemed substantive under Rules Enabling Act analysis if it "define[s] the scope of" a state-created substantive right). Like Justice Stevens, Ninth Circuit authority holds that laws "procedural in the ordinary use of the term," including the class-action device, may nonetheless define the scope of a substantive right, and thus cannot be displaced by a Federal Rule. *Shady Grove*, 559 U.S. at 423 (Stevens, J., concurring); *In re Hotel Tel. Charges*, 500 F.2d 86, 90 (9th Cir. 1974) (Rule 23 treatment of antitrust claims "significantly alters substantive rights under the antitrust statutes. Such enlargement or modification of substantive statutory rights by procedural devices is clearly prohibited by the Enabling Act").[18] The Ninth Circuit case Plaintiffs cite examined inapposite

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[17] *See Leonard v. Abbott Labs., Inc.*, No. 10-CV-4676, 2012 WL 764199, at *12 (E.D.N.Y. March 5, 2012); *In re Digital Music Antitrust Litig.*, 812 F. Supp. 2d 390, 415 (S.D.N.Y. 2011); *Tait v. BSH Home Appliances Corp.*, No. SACV 10-711, 2011 WL 1832941, at *8 (C.D. Cal. May 12, 2011); *In re Wellbutrin XL Antitrust Litig.*, 756 F. Supp. 2d 670, 675 (E.D. Pa. 2010).

[18] Indeed, several Ninth Circuit judges interpreting the Rules Enabling Act recently cited with favor Justice Stevens' *Shady Grove* concurrence and his conclusion that "there are some state procedural rules that federal courts must apply in diversity cases because they function as part of

California case law holding that the appealability of a punitive damages award cannot be waived. *Freund*, 347 F.3d at 761. This was a rule of general application that governed appealability regardless of the underlying right asserted, and the Ninth Circuit deemed it procedural because it neither created a substantive right nor did not "add, subtract or define" an element of the underlying claim. *Id*. at 761-62.

In contrast, the Illinois, Montana and South Carolina statutes at issue create substantive rights and define the scope of those rights to exclude representative claims.[19] Allowing Plaintiffs to proceed in a representative capacity would redefine that right, violating the Rules Enabling Act. Indeed, several courts have held that the Illinois, Montana and South Carolina class-action bans are substantive limitations, which cannot be displaced by the application of Rule 23. *See, e.g.*, *Stalvey v. Am. Bank Holdings, Inc*., No. 4:13-cv-714, 2013 WL 6019320, at *4 (D.S.C. Nov. 13, 2013) ("the prohibitions against class actions [in South Carolina Unfair Trade Practices Act] are substantive portions of South Carolina law"); *In re Nexium (Esomeprazole) Antitrust Litig*., 968 F. Supp. 2d 367, 409 (D. Mass. 2013) (application of Rule 23 to Illinois Antitrust Act claim would abridge, enlarge or modify state-created right or remedy); *Digital Music*, 812 F. Supp. 2d at 415-16 (Illinois statute "defines the scope of" state-created substantive right or remedy); *Wellbutrin*, 756 F. Supp. 2d at 677 (Illinois class-action ban is a substantive limitation); *In re New Motor Vehicles Canadian Export Antitrust Litig*., 241 F.R.D. 77, 83 (D. Me. 2007) (Montana class-action ban defines capacity to sue, or available remedy, and therefore is substantive).

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the State's definition of the substantive rights and remedies." *Makaeff v. Trump Univ., LLC*, 736 F.3d 1180, 1187 n.8 (9th Cir. 2013) (Wardlaw, J. and Callahan, J., concurring in denial of petition for *en banc* rehearing) (internal quotation marks and citation omitted). The four concurring judges concluded that California's anti-SLAPP law imposes "substantive limitations" on state-law actions, and that displacing those limitations with Federal Rules would be "bad policy" and "arguably" a Rules Enabling Act violation. *Id*. at 1187 & n.8.

[19] Defendants do not, as Plaintiffs claim, argue that class-action bans are substantive because they are "adjacent in each state's statute books to substantive state rights." Opp'n at 28. These provisions are substantive because they are each part and parcel of the statute's definition of the right to sue. Plaintiffs further obfuscate by arguing that the *Shady Grove* majority found the structure of the state statute to be "immaterial." *Id*. The quoted passage relates only to the threshold question of whether the federal and state rules concern the same subject matter, not whether application of the Federal Rule would "abridge, enlarge or modify" a state-created substantive right, the question presented here. *Shady Grove*, 559 U.S. at 400-01.

Plaintiffs argue that various state courts "recognize that the class action device is procedural …." Opp'n at 28; *id*. at 27 n.27 (citing cases). But the cases cited analyze neither the Rules Enabling Act nor any of the state statutes at issue here. In fact, one opinion contradicts Plaintiffs' argument that class action rules are necessarily procedural. *See Smith v. Ill. Cent. R.R. Co*., 860 N.E.2d 332, 339 (Ill. 2006) ("Aggregating claims can dramatically alter substantive tort jurisprudence.") (quoting *Southwestern Refining Co. v. Bernal*, 22 S.W.3d 425 (Tex. 2000)); *see also Smith*, 860 N.E.2d at 340 (agreeing with *Southwestern*'s reasoning and conclusions).

The district court cases Plaintiffs cite are also not persuasive. The *ODD* opinion summarily denied defendants' motion to dismiss, with no analysis. *In re Optical Disk Drive Antitrust Litig.*, No. 3:10-md-2143, 2012 WL 1366718, at *8 (N.D. Cal. April 19, 2012). Judge Seeborg, who decided *ODD*, apparently reversed course on this issue and recently dismissed class-action claims under a Tennessee statute with a similar class-action ban. *In re Ford Tailgate Litig.*, No. 11-CV-2953-RS, 2014 U.S. Dist. LEXIS 32287, at *38-39 (N.D. Cal. March 12, 2014). The *Hydroxycut* opinion relies on Justice Scalia's plurality opinion in *Shady Grove*, which Plaintiffs concede is not controlling. *In re Hydroxycut Mktg. and Sales Practices Litig*., No. 09-md-2087, 2014 U.S. Dist. LEXIS 11750, at *69 (S.D. Cal. Jan. 27, 2014). The *Automotive Parts* opinion reaches inconsistent results, dismissing a class action claim under the Illinois statute but denying a motion to dismiss a class action claim under the South Carolina statute. *In re Automotive Parts Antitrust Litig.*, No. 12-md-02311, 2013 WL 2456612, at *22, *30 (E.D. Mich. June 6, 2013). None of these cases provides a basis for permitting class action claims to go forward under these state statutes.

2. Governing Authority Requires Conspiratorial Conduct In New Hampshire To State a Claim under New Hampshire Law.

Plaintiffs deny that the NHCPA requires allegations of intra-state anticompetitive *conduct* in addition to anticompetitive *effects*. As anticipated in Defendants' opening brief, Plaintiffs base this contention entirely on a single distinguishable case, *LaChance v. U.S. Smokeless Tobacco Co*., 931 A.2d 571 (N.H. 2007), and a subsequent misapplication of that decision in *In re Chocolate Confectionary Antitrust Litig*., 749 F. Supp. 2d 224 (M.D. Pa. 2010). As explained in subsequent cases, including by Judge Armstrong in *Flash*, *LaChance* "merely states that 'indirect purchasers

may bring claims under the CPA'"; it "does not address the requirement that the offending conduct occur within the state." *Flash*, 643 F. Supp. 2d at 1159 (internal quotations omitted); *accord Precourt v. Fairbank Reconstruction Corp.*, 856 F. Supp. 2d 327, 343 (D.N.H. 2012). Plaintiffs ignore the subsequent authority in *Flash* and *Precourt* that intra-state conduct is required. *See also Refrigerant Compressors*, 2013 WL 1431756 at *17-18. Nor is there merit to Plaintiffs' argument that *Environamics* and *Mueller* should be ignored because these they were unpublished.[20] The Civil Local Rules for the District of New Hampshire—the only rules that matter in this context, *see* N.D. Cal. Civ. L.R. 3-4(e)—expressly allow unpublished opinions made available on its court website to be cited. D.N.H. Civ. L.R. 5.3(b).

3. Arkansas State Courts' Interpretation of Their Own State Law Trumps Any Dictionary Definition.

Plaintiffs fail to identify a single Arkansas authority applying the Arkansas Deceptive Trade Practices Act ("ADTPA") to price-fixing or any other antitrust violation. Instead, Plaintiffs cite federal opinions that rely largely on dictionary definitions of "unconscionable" and disregard the established meaning of this term in Arkansas law. Opp'n at 30 n.31.

Only state courts may authoritatively construe state statutes. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 599, 577 (1996). Arkansas courts have consistently used "unconscionable" to refer to contractual relationships or unequal bargaining power. *See* Mot. at 28-30. The sole Arkansas authority cited by Plaintiffs uses the term consistently with this established meaning. *State ex rel. Bryant v. R & A Inv. Co.*, 985 S.W.2d 299, 302 (Ark. 1999) (looking to "established contract law" to define "unconscionable" under the ADTPA, and finding that the "test" asks whether "there is a gross inequality of bargaining power between the parties to the contract."). Applying this established meaning of the term, Plaintiffs' ADTPA claim should be dismissed as the statute has no application to alleged price-fixing behavior.

[20] Both *Environamics* (accessed online at http://www.nhd.uscourts.gov/ISYS/isysquery/1076f3d8-0b81-43e1-ab1d-a028efe98d06/19/doc/) and *Mueller* (accessed online at http://www.nhd.uscourts.gov/ISYS/isysquery/7da3a839-dafd-46a5-8b75-758ea37c1d13/1/doc/) are available on the District of New Hampshire's website.

Respectfully submitted: April 28, 2014

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E-FILING ATTESTATION

I, Michael W. Scarborough, am the ECF User whose ID and password are being used to file this document. In compliance with Civil Local Rule 5-1(i)(3), I hereby attest that each of the signatories identified above has concurred in this filing.

/s/ Michael W. Scarborough
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